Supreme Court, U.S.
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No. 96-1718

In The

Supreme Court of the United States

October Term, 1996

Homebuilders Association of Central Arizona, a Non-Profit Arizona Corporation; and Marlboro Development Corporation, an Arizona Corporation,

Petitioners

v.

City of Scottsdale, a Municipal Corporation, Herbert R. Drinkwater, Rene Wendell, James D. Bruner, Kathryn Campana, Myron R. Deibel, William Soderquist, and Bill Walton, Members of the City Council of the City of Scottsdale,

Respondents

On Petition For Writ Of Certiorari To The Supreme Court of Arizona

PETITIONERS' REPLY MEMORANDUM

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June 13, 1997

4 pp

Memorandum

In their Brief in Opposition, Respondents include additional information under the Statement of the Case. (Respondents' Brief, p. 2-3). This information relates to certain details of the Arizona Groundwater Management Act. However, the requirements of the Arizona Groundwater Management Act and Scottsdale's decision to pursue acquisition of new water resources remain unchallenged and are not at issue in this action. At issue is whether there was a sufficient showing of the required connection between Scottsdale's development fee and the beneficial use accruing to the fee payors.

Respondents also attempt to demonstrate that the Arizona Supreme Court has explained how imposition of the development fee benefits fee payors. (Respondents' Brief, p. 5). Respondents quote that portion of the opinion indicating:

> Developers who pay the fees and thus contribute to the capital needed for water surely will receive a benefit from the city's ability to approve new developments. Without the assurance of a water supply, developers would be unable to develop and market their land. (Pet. App. 10-11).

The above holding is seriously deficient in at least two major respects. First, the holding addresses some generalized benefit to a developer and completely ignores the standard required in this case, a beneficial use to the development. Second, the holding rests on the notion that ability to develop and market land is in itself a benefit generated when a permit (a discretionary governmental benefit) is issued. This reasoning is circular and illogical.

The Respondents also argue that the applicability of the *Dolan* standard is of purely academic interest in this case. Respondents' argument is based on the Arizona Supreme Court's holding that reasonableness of the amount of the Scottsdale fee was not raised in the trial court and that whether that fee was roughly proportional to the burden imposed on the community was likewise not in question. (Pet. App. 21).

Respondents' argument, like the opinion of the Arizona Supreme Court before it, significantly misstates the conduct of proceedings below and the issue presented. The reasonableness inquiry referenced by the Respondents and contained in the Arizona Development Fee Statute relates to reasonableness of the amount of the fee. The opinion of the Arizona Supreme Court improperly characterizes this issue as "the overall reasonableness" of the fee. From that erroneous characterization, the court compounded its error by concluding that because of the amount of the fee was not at issue there was no occasion to apply the *Dolan* test is this case. The court's reasoning and Respondents' argument both suffer from the baseless assumption that constitutional inquiry is limited to whether the amount of the fee is roughly proportional to the city's economic burden in providing public services.

This argument ignores the breath of the inquiry historically applied by state courts and by this Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In *Dolan*, the question presented was whether the city's findings were constitutionally sufficient to justify the conditions imposed on issuance of the building permit. This Court's analysis centered around whether the permit conditions bore the required relationship to the projected impact of the development. This Court held: "[A] use restriction may constitute a taking if not reasonably necessary to the effectuation of a substantial government

purpose." *Id.* at 388, (quoting *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 127 (1978)).

Respondents' argument ignores the fact that this Court has specifically held that a proper inquiry rests on a determination of whether the required dedication is related both in nature and extent to the impact of the proposed development. Respondents' argument ignores the substantive half of the inquiry and would relegate the rough proportionality test to a mere review of the mathematical calculations used to determine the amount of a development fee. This issue is clearly of minor constitutional significance when compared to the benefit issue erroneously decided by the Arizona Supreme Court in this matter.

Respectfully submitted,

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